Supreme Court, U.S.
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No. 04-436

IN THE

Supreme Court of the United States

GEOFFREY T. MOTT,

Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF

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THE SPECIAL REFEREE AND THE APPELLATE DIVISION RELIED EXCLUSIVELY UPON THE AFFIDAVIT IN SUSTAINING THE JAVAHERIAN CHARGE

Respondent concedes that the findings of the Special Referee and the Appellate Division sustaining Charge One of the Petition were based upon the consideration of an affidavit not formally entered into evidence. Respondent acknowledges that "[t]his affidavit, annexed to the Petition as an exhibit was never actually introduced into evidence during the course of the hearing, nor was it admitted by the pleadings." Opposition to Petition at 2.

Respondent suggests, however, that the findings were based only "in part" upon this hearsay affidavit. Respondent surmises that the Special Referee and the Appellate Division, in denying reargument, "presumably relied upon the residuum of admissible evidence cited by the Special Referee in sustaining this particular Charge including that Petitioner lacked the consent of both parties to the escrow to invade and use the escrow." *Id.*

This statement by the Special Referee was based upon his observation that petitioner admitted in paragraph 13 of his Answer, in response to Charge Two, that all communications were with Ira and not Rubina Javaherian. However, in relying upon this admission and in making this observation the Special Referee ignored the fact that petitioner denied that he represented Rubina Javaherian who was represented by counsel. Petitioner also denied that Rubina Javaherian owned or gave the funds to him. Answer at paras. 5, 6. These are the reasons why petitioner did not communicate with Rubina Javaherian. Nonetheless, there was no allegation in Charge One that petitioner did not have the consent of Rubina Javaherian to borrow the funds.

There is no "residuum of admissible evidence" on this record that supports the only allegation appearing in Charge One of the Petition that the single complainant, Ira Javaherian, denied giving respondent the authority to utilize the funds. Nor is there an allegation in Charge One that someone other than Ira Javaherian denied giving petitioner the authority to use the funds. The two essential allegations appearing in Charge One are found in paragraph 10: "[c]omplainant, Ira Javaherian, denies giving Respondent authority to utilize his twenty thousand dollars ($20,000)," and in paragraph 11, "[a] true copy of the Affidavit of Ira Javaherian is attached as Exhibit D."

Respondent does not direct the Court to any admissible evidence in the record that supports the findings by the Special Referee and the Appellate Division. In fact, the Special Referee confirmed that the sole basis of his finding was the affidavit. He stated in his findings, "Ira Javaherian, in his affidavit denies ever giving respondent his permission or consent to use these funds. (Exhibit D, paras. 3-7)." Report at 5. The Appellate Division repeated this finding in its order, "[m]oreover, Ira Javaherian denied giving the respondent the authority to utilize the $20,000." Appendix to Petition for a Writ of Certiorari at 2a. The Special Referee also confirmed the fact that "other than Exhibit 9 (copy of check) and Exhibit 10 (bank statement) hereinabove referred to, no other evidence or testimony on this charge was presented before me by either the petitioner or the respondent." Report at 5. Accordingly, the affidavit was the exclusive source for the finding by the Special Referee and the Appellate Division that the sole complainant did not authorize the use of the funds as alleged in Charge One.

Respondent minimizes the constitutional violation herein by characterizing it as a mere "isolated evidentiary error." Opposition to Petition at 1. Petitioner submits that respondent's

assessment of the constitutional violation here is emblematic of the insensitivity to the requirements of procedural due process in attorney disciplinary proceedings in New York. Where, as here, New York can disbar an attorney on the basis of an affidavit alone, this event is significantly more than a mere "isolated evidentiary error." This action taken by the State represents a deprivation of constitutionally protected due process rights guaranteed under the Fourteenth Amendment to the United States Constitution.

The refusal of the New York courts to overturn this disbarment order must send a chill down the spine of any practicing attorney. In New York, where the burden of proof in a disciplinary proceeding is only a preponderance of evidence, this case stands for the proposition that this minimal burden of proof can be met by simply annexing an affidavit from an absent complaining witness to the Petition. It is also clear from this litigation that New York courts will not insure that attorneys are afforded fundamental due process protections in attorney disciplinary proceedings. For these reasons, petitioner respectfully requests that the Court grant this Petition.

RESPONDENT HAS NOT OPPOSED THE MERITS OF THE DUE PROCESS ARGUMENT IN THE SUSSMAN CHARGE

Respondent has not addressed or opposed the merits of the constitutional due process argument that petitioner has made regarding the Sussman charge. Instead, as if making a closing argument at a trial, without referring the Court to evidence in the record, respondent surmises what the evidence established. The question presented by that evidence at the hearing, however, was whether or not respondent proved by a preponderance of evidence the allegations that appeared in Supplemental Charge One or whether, as petitioner contends, he was disbarred on the

basis of a charge not appearing in that Petition and was thus denied the due process of law.

Petitioner has been disbarred by order of the Appellate Division in which the Court found that petitioner represented the seller in a real estate contract, was the designated fiduciary in that contract and violated very specific fiduciary obligations that were imposed upon him pursuant to that contract. Not even respondent argued at the conclusion of the trial that petitioner represented the seller or was the fiduciary named in the contract. When, the factual basis and legal theory of liability of Supplemental Charge One—that there was an attorney client relationship and this contract created and imposed fiduciary obligations upon petitioner that he violated—were proven to be false, that charge could not and should not have been sustained. Therefore, petitioner was disbarred based upon a charge other than the one appearing in the Petition. Respondent has not denied this conclusion in its opposition.

Finally, respondent offers an interpretation of the evidence that was before the Special Referee at this hearing. However, this present interpretation of the evidence is at odds with respondent's position taken in this litigation. The parties have addressed the significance of the evidence many times in proceedings before the Appellate Division, on the Motion for Reargument and/or Permission to Appeal, and before the New York Court of Appeals, on the Motion for Leave to Appeal. In response to petitioner's arguments made in these courts about what the evidence did show, respondent: (a) did not deny that it was error for the Court to find that Petitioner was Sussman's client when the contract stated (and the Special Referee found) that the Galarzas were Petitioner's clients; (b) did not contest that Petitioner was not the escrow agent under the contract; (c) did not contest that it was error for the court to find that the escrow agent was required to deposit the funds in an interest

bearing account when the contract provided for deposit in a non-interest bearing account; (d) did not deny that it was a denial of due process for the Special Referee to refuse to recall Sussman on the question whether the funds belonged to her after documents obtained proved her testimony false; (e) did not deny that the evidence proved that the funds in issue belonged to Sussman, not the Galarzas; (f) did not deny that the weight of the evidence established that Sussman authorized the use of the funds; and (g) did not deny that it was error for this Court to find that petitioner drew from his escrow account a check without sufficient funds on deposit when the evidence proved conclusively that petitioner did not attend the closing and did not execute the check. Accordingly, respondent's present representation to this Court of what the evidence showed at this hearing is not consistent with the position it has maintained before the Appellate Division and the Court of Appeals.

CONCLUSION

Petitioner respectfully requests that the Court grant this Petition for a Writ of Certiorari and reverse the judgment of the Appellate Division, Second Department.

Respectfully submitted,

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